In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-169

WILLIAM STEVEN COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A) is reported at 448 F. 2d 925. The order of the court of appeals *en banc* reversing the decision of the panel and remanding the case to it for disposition of other issues (Pet. App. B) is not reported. The opinion of the court of appeals on remand (Pet. App. C) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1972. The petition for a writ of certiorari was filed July 31, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's declaration of a mistrial in the interest of the defendants prior to the decision in *United States* v. *Jorn*, 400 U.S. 470, precluded a retrial under the Double Jeopardy Clause.

2. Whether the effect of the equal division of the court of appeals on rehearing *en banc*, following a reversal of the conviction by a panel, was to affirm the judgment of the district court.

STATEMENT

After a second jury trial with others in the United States District Court for the District of South Carolina, petitioner was convicted of conspiring to burglarize banks, in violation of 18 U.S.C. 2314. He was sentenced to concurrent prison terms of five and seven years, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). On appeal, a panel of the court of appeals reversed the convictions of petitioner and his co-defendants on the ground that the first trial had been unnecessarily aborted and the second trial thus constituted double jeopardy (Pet. App. A). A petition for rehearing with suggestion for rehearing *en banc* was granted. Thereafter the full court en-

tered an order (Pet. App. B), affirming by an equally divided court the decision of the district court with respect to the double jeopardy question and remanding the case to the original panel for consideration of the remaining issues. On remand, the panel affirmed the convictions of petitioner but reversed the convictions of his co-defendants on certain other counts for lack of proper venue (Pet. App. C).

The facts with regard to the question of double jeopardy are not in dispute and are set forth in the initial opinion of the panel (Pet. App. A 13-15). The first trial commenced on March 23, 1970. On the third day of trial, a United States Marshal advised the judge that during the lunch hour two of the jurors had inadvertently remained in the jury room and had seen the defendants in handcuffs. The judge held a conference with counsel to consider whether in the circumstances a mistrial should be declared. Defense counsel proposed posssible curative procedures, including the substitution of the two alternate jurors who had been sworn for those who had viewed the defendants in handcuffs, but these proposals were rejected by the judge, who stated that he deemed the Fourth Circuit's decision in *Holmes* v. *United States*, 284 F. 2d 716, to be controlling and suggested that defendants consider a mistrial motion. After a brief recess, four co-defendants (but not petitioner) moved for a mistrial. The trial judge thereupon declared a mistrial as to all defendants. Those defendants, including petitioner, who wished to proceed with the trial then moved to sever. Counsel for petitioner

advised the court that his position was that a mistrial over his objection would constitute double jeopardy. After the government argued that separate trials would be impractical, the judge denied the motions to sever.

The second trial was conducted in May 1970. The trial judge overruled the defendants' motions to dismiss on double jeopardy grounds, and they were all convicted. In September 1971, a panel of the court of appeals reversed the convictions of all defendants in an opinion based principally on the intervening decision in *United States* v. *Jorn*, 400 U.S. 470. The three-judge panel noted that the district judge in "aborting the first trial and denying the plea of double jeopardy entered at the second trial acted in light of *Gori* v. *United States*, 367 U.S. 364, * * * *United States* v. *Tateo*, 377 U.S. 463, * * * and without benefit of *Jorn*" (Pet. App. A 17). The panel stated (*id.* at 17-18):

> But for *Jorn*, as we have said, we would be inclined to affirm for it is clear to us that the district judge acted out of zealous solicitude for the protection of the rights of the defendants and without the slightest intention to harass or oppress them. As recently as 1968 we noted that the discretion of the trial judge to abort a trial "is undoubtedly being narrowed, as a practical matter, by awareness of the closer scrutiny to which the exercise of his discretion is now subjected." * * * But even then we interpreted *Gori* and *Tateo* to insulate second prosecutions from attack where the first one had been aborted by the trial judge as a matter of fairness

> to the defendant—even an overly solicitous fairness. Doubtless the district judge here was led by *Gori*, *Tateo* and our interpretation of them * * * to reasonably believe that so long as he acted out of concern for the best interest of the defendants, and there is no doubt he was genuinely concerned, his abortion of the trial would not constitute an abuse of discretion.

The court went on to state its view that "*Jorn* all but eliminates trial judge motivation as an element to be considered in determining whether an aborted trial bars reprosecution" (Pet. App. A 18). It held that *Jorn* required reversal since the trial judge had not exhausted "all other reasonable possibilities before deciding to foreclose defendants' option to proceed" (Pet. App. A 19), and thus had not complied with the *Jorn* standard of a "scrupulous exercise of judicial discretion" (*ibid.*, quoting from *Jorn*, *supra*, 400 U.S., at 485). In our petition and brief on rehearing *en banc* the government argued both that the reasoning of *Jorn* did not mandate reversal and that in any event *Jorn* should not have been applied retroactively to this case.

ARGUMENT

The court of appeals *en banc* correctly declined to hold petitioner's retrial barred by the Double Jeopardy Clause. There is no reason for further review.

1. The determination whether to declare a mistrial is one which is committed in the first instance to the discretion of the trial judge. In this case, the trial judge reasonably concluded that the sight of some of the defendants in handcuffs created an irreparable

risk that the jurors would suspect that they were under commitment for previous crimes. Although such a risk of prejudicial knowledge or suspicion may not in itself mandate a mistrial, the declaration of a mistrial in such circumstances does not constitute an abuse of discretion. See *Gori* v. *United States*, 367 U.S. 364; *United States* v. *Tateo*, 377 U.S. 463.

In *United States* v. *Jorn*, 400 U.S. 470, 487, where there was no opinion joined in by a majority of the Court, the plurality opinion stated that the trial judge there had "made no effort to exercise a sound discretion to assure that * * * there was a manifest necessity for the *sua sponte* declaration of * * * mistrial." That opinion emphasized that the trial judge there had acted so abruptly that neither side had an appropriate opportunity for either objecting or proposing curative measures. The situation here is very different from that in *Jorn*. The trial judge here did not act abruptly but rather discussed the matter with counsel and permitted a brief recess for deliberation (Pet. App. A 15). The judge did not act *sua sponte* but only after four defendants formally moved for a mistrial. His decision was not made arbitrarily; it was instead a conscious effort to act in accordance with the decisional law of his circuit (*Holmes* v. *United States*, 284 F. 2d 716 (C.A. 4)). Although petitioner did not move for a mistrial, the declaration as to him was well within the trial court's discretion in view of the impracticality of severing the conspiracy prosecutions.

2. Petitioner also argues (Pet. 8) that the equal division of the court of appeals sitting *en banc*, following the issuance of an opinion by a panel of the court reversing the conviction, should have the effect of affirming the judgment of the panel and not of the district court. However, the apparently unanimous view of the judges in the court below that their equal division on the merits affirmed the judgment of the trial court is in accord with the practice of the other courts of appeals. See *Drake Bakeries Inc.* v. *Local 50, American Bakery & Confectionery Workers*, 294 F. 2d 399 (C.A. 2), affirmed, 370 U.S. 254;[1] Rule 3(b) of the Rules of the Sixth Circuit.[2]

That an equally divided reviewing court should affirm the judgment of the court below is a sound principle of federal appellate adjudication. The court sits *en banc* to provide an authoritative ruling in review of a judgment of the district court; it does not act as a "super" court of appeals to review judgments of three-judge panels. Petitioner offers no reason why an equally divided *en banc* court should defer

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[1] This Court noted in *Drake Bakeries* that the issue of the propriety of the Second Circuit's disposition was raised in the petition for certiorari but later abandoned. 370 U.S. at 255, n. 1.

[2] Rule 3(b) provides in pertinent part:

> The effect of the granting of a rehearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket as a pending appeal.

No other court of appeals has specified the effect of the granting of a petition for rehearing *en banc* in its rules.

to a panel made up out of its own membership, and we see none.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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